Petition

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81-717

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GANDELIA M. CORDOVA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the search of petitioner's residence a proper probation condition search under Federal law?

2. Was the State condition of probation overly broad and unreasonable, and thus unconstitutional under the Fourth Amendment of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a Petition for GANDELIA M. CORDOVA for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on July 6, 1981, refusing to reverse Ms. CORDOVA's conviction for knowingly and intentionally possessing

with intent to distribute heroin in violation of Title 21, United States Code Section 841(a)(1). The United States Court of Appeals for the Ninth Circuit ruled that the search of Ms. CORDOVA's residence was proper as a condition of her probation. Specially, the Court held that the Federal Probation Act, and the Court's previous opinion in **United States v. Consuelo-Gonzalez**, 521 F.2d 259 (9th Cir. 1975) (en banc), which interpreted that Act, were not relevant to the search of Ms. CORDOVA's residence, but that the search was governed and valid under California law. The Court failed to consider, however, the "constitutionality" of the search under the Fourth Amendment, ruling that that issue had not been raised in the District Court. One of

the judges on the panel, the Hon. Justin L. Quackenbush, District Judge, sitting by designation, dissented from the Court on this point and would have ordered supplemental briefs and argument on the Fourth Amendment question.

OPINIONS BELOW

To the petitioner's knowledge, the opinion in the United States Court of Appeals for the Ninth Circuit, affirming Petitioner's conviction, has been officially reported, but has not as yet been published. (A copy of the Opinion is attached hereto as Appendix "A".)

JURISDICTION

1. On June 27, 1980, the Federal Grand Jury for the Southern District of California returned a One-Count Indictment against petitioner charging a violation of 21 U.S.C. § 841(a)(1).

2. On September 30, 1980, petitioner was tried before the Hon. Howard B. Turrentine, United States District Judge, on "stipulated facts", and was convicted of knowingly and intentionally possessing with intent to distribute approximately 561 balloons of heroin. On November 5, 1980, petitioner was committed to the custody of the Attorney General for a period of five (5) years. It was further ordered that petitioner serve a Special Parole Term of ten (10) years as proscribed by 21 U.S.C. § 841(b)(1)(A). Petitioner

thereafter filed a timely Notice of Appeal.

3. On July 6, 1981, the United States Court of Appeals for the Ninth Circuit affirmed CORDOVA's conviction and on August 25, 1981, CORDOVA's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by said Court.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by

oath or affirmation and particularly describing the places to be searched and the persons or things to be seized."

2. Title 18, U.S.C. § 3651:

"Suspension of Sentence and Probation. Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed 5 years.

While on probation and among the conditions thereof, the defendant -- may be required to pay a fine in one or several

sums; and may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offenses for which conviction was had; and may be required to provide for the support of many persons, for whose support he is legally responsible."

3. Title 21, U.S.C. § 841(a)(1):

"Section 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, a controlled substance."

4. California Penal Code § 1203.1:

"The court or judge thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine. The court, or judge thereof, in

the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case;. . .

* * *

The court may impose and require any or all of the above-mentioned terms of imprisonment, fine and conditions and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer . . ."

STATEMENT OF THE FACTS

Through information received from other law enforcement officers and other persons in the National City area, Agent Donald A. Berstler of the Narcotics Task Force became involved in an investigation involving the petitioner. As part

of that investigation, Agent Berstler checked with a Ms. Catherine Starbird, a probation officer for the State of California, and found that petitioner was subject to search and seizure of her person, property, residence and vehicle by any police officer or probation officer, as a condition of probation on a conviction of possession of heroin for sale.

On June 18, 1980, Agent Berstler caused surveillance to be initiated at petitioner's residence. [1] During the afternoon hours, the vehicle petitioner was driving was stopped by a marked National City Police unit. Agent

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[1] Agent Berstler had received information that persons would call, petitioner at her place of business and after receiving such a call petitioner would drive to her residence, pick up a quantity of heroin, and deliver it.

Berstler contacted petitioner shortly thereafter in the back seat of the police vehicle and advised her of her constitutional rights. When petitioner stated that she understood her rights and that she was willing to talk to Agent Berstler, he advised her that she was subject to search and seizure by a police officer or probation officer and that he was going to have her person and residence searched pursuant to the waiver of her Fourth Amendment rights. Petitioner replied to go ahead as she did not have anything.

After petitioner was transported to the National City Police Department and a search of her person proved negative, she was taken to her residence at 211 N. "T" Avenue, National City. A warrantless search of the residence was then

conducted. Found in a bedroom was a cellophane plastic bag which contained eleven (11) rolled balloons. In the kitchen, there was found Ohaus scales, a funnel, which had a brown powder debris, empty toy balloons, dextrose, and two paper sacks containing numerous packages of rolled balloons. Each package contained eleven balloons and there was a total of 561 balloons. Also found in the residence was petitionr's registration under California Health and Safety Code Section 11950, showing her to be a registered narcotics offender and cancelled mail envelopes in petitioner's name.

REASONS WHY THE WRIT SHOULD BE GRANTED

In **United States v. Consuelo-Gonzales**, 521 F.2d 259 (9th Cir. 1975), the Ninth Circuit, sitting en banc, held that a probation condition similar to the condition in the case at bar, was overly broad in its scope and not in keeping with the purposes intended to be served by the Federal Probation Act. In reaching this decision, the Court "concluded that any search made pursuant to the condition included in the terms of probation must necessarily meet the Fourth Amendment standard of reasonableness." (521 F.2d at 262.) Finding that the condition imposed on **Consuelo-Gonzales**, which permitted a search solely by a law enforcement officer, did

not satisfy this standard of reasonableness, the Court struck down the condition as not serving the broad purpose of the Act.

What is obvious from a careful reading of the **Consuelo-Gonzales** opinion is that the "cornerstone" of the Court's analysis was the Fourth Amendment. 2/ The condition imposed upon **Consuelo-Gonzales** was held to be unreasonably related to the purposes of the Probation Act because the condition violated the Fourth Amendment standard of reasonableness. The constitutional deficiency thus acted as the catalyst for the

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2/ The primary importance of the Fourth Amendment question is made clear by the Court's reliance on **Latta v. Fitzharris**, 521 F.2d 246 (9th Cir. 1975), which imposed a similar standard of reasonableness based only upon the Fourth Amendment, and not any relevant legislation.

subsequent statutory interpretation, and formed the "framework" upon which the Court built its ultimate decision.

In arguing this matter previously before Judge Turrentine, petitioner's counsel, Mr. Michael Pancer, phrased the legal issue not in terms of a constitutional violation, but as a question of which standard, the Federal or State, should be applied to this particular factual situation, Judge Turrentine found that the State standard of permitting a police officer, rather than the Federal standard of requiring a probation officer, to conduct a search of probationers, was the appropriate standard and denied the motion. On appeal, the appellate court agreed that the search was governed by California law, and as the California Supreme Court

had held that a condition requiring probationers to submit to a search by a law enforcement officer was valid (**People v. Mason** (1971), 5 Cal.3d 759, 97 Cal.Rptr. 302), the search of petitioner's residence was proper. The Court also indicated, however, that it was not considering the constitutionality of the search under the Fourth Amendment, ruling that this issue had not been raised. Indeed, Judge Quackenbush, sitting by designation, suggested in a dissent that supplemental briefs, on the Fourth Amendment issues, be filed and argument heard on this important question.

While counsel must unfortunately admit that his fellow brother was extremely short-sighted and narrow-minded in the way he handled this

issue, [3] it still cannot be said that the crucial constitutional question was never raised. By necessity, had the appellate court adopted petitioner's argument and applied the Federal rule of **Consuelo-Gonzales**, in effect the Court would have been condemning the State standard as violative of the Fourth Amendment. Each question presented the flip-side of the same coin, and the Court could not have ruled favorably on petitioner's argument without discussing the constitutional issue. Though not briefed or argued in the best legal manner, the constitutional question was

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[3] Due to the apparent failure of prior counsel to raise the constitutional question in the court below, it would appear that petitioner has grounds to file a habeas corpus action pursuant to 28 U.S.C. § 2255.

simply inherent in any discussion of this issue.

It is therefore submitted that as the constitutional question was at least inferentially raised in the courts below, the granting of this petition to resolve the important constitutional question raised by the conflict in the Federal and State statutes is clearly warranted. Not only because this petitioner should not be penalized because of the essentially semantical errors of her attorney, but because thousands of men and women are presently subject to a daily unconstitutional invasion of their Fourth Amendment rights by law enforcement officers in California.

Thus, in the interest of judicial economy; the fair administration of

justice; and the avoidance of again having to raise the serious constitutional question in a Section 2255 proceeding, this Court should grant the instant Petition for Writ of Certiorari to allow further argument on what the appellate court clearly recognized as the central issue in this case.

ARGUMENT

A. THE SEARCH OF PETITIONER'S RESIDENCE WAS NOT A PROPER PROBATION CONDITION SEARCH UNDER FEDERAL LAW.

As indicated in the Statement of the Facts, the search of petitioner's residence was conducted pursuant to a condition of her State probation which required that she "Submit her person, property, place of residence or abode, vehicle, personal effects to search at

any time, with or without a search warrant, by the Probation Officer or any law enforcement officer." In **United States v. Consuelo-Gonzales**, 521 F.2d 259 (9th Cir. 1975), the Court, sitting en banc, held that a probation condition similar to the condition in the case at bar, was overly broad in its scope and not in keeping with the purposes intended to be served by the Federal Probation Act. Relying on the Court's previous decision in **Latta v. Fitzharris**, 521 F.2d 246 (9th Cir. 1975), which imposed a standard of reasonableness on searches of California parolees by California parole officers, the Court concluded that a proper condition of probation regarding searches would be:

> "That she submit to search of her person or property conducted in a reasonable manner and at a reasonable time by a

probation officer." (521 F.2d at 263; emphasis added.)

The facts of **Consuelo-Gonzales** are almost identical to those in the case at bar. In that case, federal and local law enforcement officers approached the **Consuelo-Gonzales'** residence for purposes of conducting a search of the premises. When they arrived, they found the front door of the house ajar. The agents knocked on the door and waited for Consuelo-Gonzales to appear. When she did so, the lead agent showed her his identification, informed her that he was aware of her probation and the conditions which had been attached to it, and indicated his intention to enter the residence and conduct a search. Consuelo-Gonzales responded to his request by stepping back and saying,

"Sure, search my purse." Upon entering the house, the lead agent made a cursory search of her handbag to determine whether it contained weapons. When none was found, the handbag was placed beside a chair in which Consuelo-Gonzales asked to sit. A thorough search of her person and residence was then commenced. In the bedroom, the agents found a narcotics injection outfit in a dresser, and on a shelf in the living room they discovered a paper sack containing a bundle of notebook papers with brown powder debris on them. A second search of Consuelo-Gonzales' handbag revealed two coin purses, inside of which the agents found two white paper bindles and seven rubber condoms containing a total of 11.7 grams of brown powder, later proven to be heroin. All these items

were seized, and subsequently used to provide the basis for Consuelo-Gonzales' conviction.

Based on these facts, the Court held that the search was invalid. While recognizing that some forms of search by probation officers are not only compatible with rehabilitation, but, with respect to those convicted of certain offenses such as possession and distribution of narcotics, are also essential to the proper functioning of a probationary system, the Court concluded that this special and unique interest in invading the privacy of probationers did not extend to law enforcement officers generally. As stated by the Court:

> "To interpret the Federal Probation Act in such an expansive manner would not be reasonably related to the Act's purposes. For this reason we interpret the Act to require

> that searches of probationers not otherwise in compliance with the usual standards of the Fourth Amendment be by, or under the immediate and personal supervision of, probation officers. Inasmuch as the search of Consuelo-Gonzales' residence and handbag occurred neither during the course of a probation visit by a probation officer nor pursuant to a proper warrant, the evidence must be suppressed." (521 F.2d at 266; emphasis added.)

The rationale behind the **Consuelo-Gonzales** decision was subsequently followed in **United States v. Gordon**, 540 F.2d 452 (9th Cir. 1976), and **United States v. Jeffers**, 573 F.2d 1074 (9th Cir. 1978). In both of these cases, the searches were upheld because the probation officer actually was involved in the search after receiving information that the probationer was violating the conditions of his probation. While law enforcement officers were present

during the search, each Court held that this fact alone did not convert the search into a police search violating the Fourth Amendment.

Such was not the situation in the case at bar. For in the instant case, the search was conducted solely by law enforcement officers, without the participation or direction of petitioner's probation officer. There can be no question that when Agent Berstler had petitioner detained on June 18th, it was his intention to search her person, property and residence pursuant to the search and seizure condition of her probation. When the search was conducted by law enforcement officers not under the immediate and personal supervision of a probation officer, the warrantless

search was no longer a proper probation condition search under Federal law.

B. THE STATE CONDITION OF PROBATION, UPON WHICH THE SEARCH OF PETITIONER'S RESIDENCE WAS BASED, VIOLATES THE FOURTH AMENDMENT STANDARD OF REASONABLENESS.

Before stating the precise holding in **Consuelo-Gonzales**, the Court went through a three-step analysis. The first part of the Court's discussion concerned the relationship between a search and seizure condition imposed under the Federal Probation Act and whether such a condition reasonably related to the purpose of the Act. In answering this question, the Court "concluded that any search made pursuant to the condition included in the terms

of probation must necessarily be the Fourth Amendment standard of reasonableness." (521 F.2d at 262.) Again, finding that the condition imposed on Consuelo-Gonzales, which permitted a search solely by a law enforcement officer, did not satisfy this standard of reasonableness, the Court struck down the condition as not serving the broad purpose of the Act.

What is obvious from this discussion is that the "cornerstone" of the Court's opinion was the Fourth Amendment. The condition imposed upon Consuelo-Gonzales was held to be unreasonably related to the purposes of the Probation Act because the condition violated the Fourth Amendment's standard of reasonableness. The constitutional deficiency thus acted as the catalyst for the

subsequent statutory interpretation, and formed the "framework" upon which the Court built its ultimate decision.

In his dissenting opinion, Judge Quackenbush focused upon this "standard of reasonableness" in concluding that the blanket Fourth Amendment waiver imposed upon petitioner was overly broad and unreasonable, and thus violative of the Fourth Amendment. Judge Quackenbush distinguished the California Supreme Court decision of **People v. Mason**, 5 Cal.3d 759, 97 Cal.Rptr. 302 (1971), relied upon by the majority, as that decision was based on the "contractual" theory, to wit: the probationer had the choice of accepting the complete waiver of his Fourth Amendment rights or rejecting probation and serving the sentence. Judge Quackenbush correctly

recognized that this advance waiver theory had recently been limited in an administrative matter by this Court in **Marshall v. Barlow's, Inc.**, 436 U.S. 307, 98 S.Ct. 1816 (1978). Judge Quackenbush also pointed out that the Ninth Circuit had specifically rejected the contractual philosophy of the California Court. In **United States v. Pierce**, 561 F.2d 735, 739 (9th Cir. 1977), the appellate court stated:

> "However in **United States v. Consuelo-Gonzales**, 521 F.2d 259 (9th Cir. 1975) (en banc) we rejected the theory that a probationer voluntarily waives his rights by failing at the sentencing proceeding to object properly to the conditions imposed."

The Court in **Consuelo-Gonzales** raised a question concerning the "precise holding" and constitutionality of **Mason** in light of its decision, but decided,

however, not to express an opinion. (**United States v. Consuelo-Gonzales, supra**, 521 F.2d at 266, n. 17.) The time has come for such an opinion to be expressed and for this Court to once and for all hold that searches of probationers must be holding would not only comply with the purposes intended to be served by the Federal Probation Act, but would meet the "standard of reasonableness" demanded by the Fourth Amendment.

CONCLUSION

For the above-mentioned reasons, petitioner GANDELIA M. CORDOVA respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Dated: October 7, 1981

Respectfully submitted,

MICHAEL D. NASATIR

Attorney for Petitioner

APPENDIX "A"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gandelia M. CORDOVA,

Defendant-Appellant.

No. 80-1788.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 8, 1981.
Decided July 6, 1981.

Appeal from the United States District Court for the Southern District of California.

Before BROWNING, Chief Judge, FERGUSON, Circuit Judge, and QUACKENBUSH, * District Judge.

PER CURIAM:

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* Honorable Justin L. Quackenbush, District Judge, United States District Court for the Eastern District of Washington, sitting by designation.

Cordova was convicted in the Superior Court of the State of California for possession of heroin and placed on three years' probation with the condition that she "submit her person, property, place of residence or abode, vehicle, personal effects to search at any time, with or without a search warrant, by the probation officer or any law enforcement officer." During the probationary period agents of the San Diego Integrated Narcotics Task Force arrested Cordova and searched her residence without a warrant with the assistance of federal agents from the Drug Enforcement Administration. They found heroin.

Cordova was indicted for heroin possession and tried in the United Stated District Court for the Southern

District of California. She moved to suppress statements made and evidence seized during the probation search of her residence. The district court denied her motion and Cordova appeals.

In **United States v. Consuelo-Gonzalez**, 521 F.2d 259 (9th Cir. 1975) (en banc), we held that a search conducted by federal and local law enforcement officers pursuant to a condition of probation imposed under the Federal Probation Act, 18 U.S.C. §§ 3651-3656, was invalid because the federal Act required that probation searches be conducted by or under the immediate and personal supervision of a probation officer. 521 F.2d at 266. Cordova argues that because the search of her home was not conducted under the supervision of a probation officer, as

required by the Federal Probation Act as construed in **Consuelo-Gonzalez**, the evidence should not have been admitted in federal court.

The Federa Probation Act is irrelevant to the search of Cordova's residence. The probation condition underlying the search was imposed by a California court and was valid under California law. The California Supreme Court has held that under the California probation statute a probationer may be required to submit to search "by the Probation Officer or <u>any law enforcement officer.</u>" **People v. Mason**, 5 Cal.3d 759, 762, 766, 488 P.2d 630, 97 Cal. Rptr. 302 (1971) (emphasis added). The admissiblity in federal court of evidence seized by state officers is

governed by state standards of admissibility, subject to limitations imposed by the federal Constitution. **United States v. Fisch**, 474 F.2d 1071, 1075 (9th Cir. 1973). Under state standards the evidence was admissible.

Cordova relies upon the holding in **United States v. Sotomayor**, 592 F.2d 1219, 1223-27 (2d Cir. 1979) that the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520, controls the admissibility in federal court of evidence seized by state officers pursuant to a state-authorized wiretap. This federal statute, however, expressly applies to wiretaps authorized by state courts and conducted by state officers. 18 U.S.C. §§ 2510(3), (6), (7), and (9); 2511(2)(a)(ii); 2515; 2516(2); 2518(7); and 2519(2). **See**

United States v. Sotomayor, 592 F.2d at 1225 n.13. The Federal Probation Act applies only to probation imposed by federal courts. 18 U.S.C. § 3651.

Cordova does not challenge the constitutionality of the search under the Fourth Amendment of the United States Constitution. We therefore do not consider that issue.

AFFIRMED.

JUSTIN L. QUACKENBUSH, District Judge, sitting by designation, concurring in part and dissenting in part:

I agree that the Federal Probation Act is irrelevant to the search of Cordova's residence. However, I dissent in disposing of this matter solely on that basis.

The state court condition of probation, in effect, furnished every law

enforcement officer a key to Mrs. Cordova's front door. The questionable condition allows any law enforcement officer or probation officer "the right to search Cordova's person, property, place of residence or abode, vehicle, personal effects--at any time, with or without a search warrant," regardless of probable or even some reasonable cause. (Emphasis supplied). Admittedly, and for some unexplained reason, Cordova did not raise the obvious Fourth Amendment issue in district court or in her brief to this court. The government, however, recognized the issue and dealt with the constiutional questions at pp. 10-12 of its brief. Since I feel that the Fourth Amendment issues should be addressed by this court, I would direct that supplemental briefs be filed

and argument heard on this question. I would also allow the State of California to file a amicus brief pursuant to Rule 29 of the Fed.R.App.P. Such a procedure would likewise avoid a subsquent habeas corpus proceeding pursuant to 28 U.S.C. § 2255.

The probation system legitimately imposes restriction upon the probationer in order to insure his rehabilitation and also to deter and inhibit further criminal conduct. **Latta v. Fitzharris**, 521 F.2d 246, 249 (9th Cir. 1975). However, to withstand constitutional challenge, such restrictions must not be overly broad or unreasonable. Despite her conviction, Cordova, having been placed on probation was entitled to enjoy a significant degree of privacy. **Morrissey v. Brewer**, 408 U.S. 471, 482,

92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); **United States v. Consuelo-Gonzalez,** 521 F.2d 259, 264 (9th Cir. 1975). The California Supreme Court decision of **People v. Mason,** 5 Cal.3d 759, 762, 766, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cited by the majority, was decided upon the "contractual" theory, to-wit: the probationer had the choice of accepting the complete waiver of his Fourth Amendment rights or rejecting probation and serving the sentence. The United States Supreme Court has since limited the advance waiver theory in an administrative matter, **Marshall v. Barlow's Inc.,** 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). This court has specifically rejected the contractual philosophy of the California court. In **United States**

v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977), this court stated:

> "However in **United States v. Consuelo-Gonzalez**, 521 F.2d 259 (9th Cir. 1975) (en banc) we rejected the theory that a probationer voluntarily waives his rights by failing at the sentencing proceeding to object properly to the conditions imposed."

While the Fourth Amendment decision should await supplemental briefs and argument, the blanket waiver required of Cordova of her right to be secure in her home against unreasonable searches and seizures raises serious constitutional implications. A basic principle of the Fourth Amendment is that searches and seizures inside a home without a warrant are presumptively unreasonable. **Coolidge v. New Hampshire**, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The United States Supreme Court has

recently decided two cases which have reinforced the sanctity of one's privacy in his or her home. In **Payton v. New York**, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1979), the court ruled that the adoption of the Fourth Amendment was motivated by the indiscriminate searches and seizures conducted in England and the colonies under the authority of "general warrants". The **Payton** court further established that the evil the Fourth Amendment was designed to prevent was broader that the abuse of the general warrant. The blanket Fourth Amendment waiver imposed upon Cordova would seem to me to be as objectionable as the general warrant which could be exercised strictly at the constable's discretion.

The United States Supreme Court further reinforced the bulkhead against the constable's unreasonable entry into one's home in **Steagald v. United States,** ____ U.S. ____, 101 S.Ct. 1642, 68 L.Ed.2d 38 (April 21, 1981), wherein the court established that the Fourth Amendment prohibited a police entry into a third party's home without a search warrant for an individual believed to be hiding therein.

It is undisputed that some reasonable restrictions may be properly imposed upon a probationer's liberty. Similarly the probable cause necessary to obtain a search warrant for a convicted drug dealer's home may possibly be based upon a lesser quantum of evidence than that required for the search of the home of one not so convicted. The search of the

home of a probationer without a search warrant might be properly based upon probationary terms limiting such a search to reasonable times and based upon reasonable cause. Since I feel that the blanket waiver in this case may be overly broad and unreasonable, I respectfully dissent and would order supplemental briefs and argument on the Fourth Amendment question.

Opposition

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No. 81-717

In the Supreme Court of the United States

OCTOBER TERM, 1981

GANDELIA M. CORDOVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Probation Act, 18 U.S.C. 3651, applies to a search conducted pursuant to a state-imposed condition of probation.

2. Whether a probation condition requiring a probationer to submit to a warrantless search at any time violates the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-717

GANDELIA M. CORDOVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-13) is reported at 650 F. 2d 189.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1981. A petition for rehearing was denied on August 25, 1981. A petition for a writ of certiorari was filed on October 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was sentenced to five years' imprisonment, to be followed by a ten-year

special parole term. The court of appeals affirmed (Pet. App. A-1 to A-13).

1. The evidence at trial, which proceeded on stipulated facts, showed that in 1980 petitioner was convicted in state court of possession of heroin, and was placed on probation for three years. A condition of her probation required her to register with the local police department as a convicted narcotics offender and to "submit her person, property, place of residence or abode, vehicle, personal effects to search at any time, with or without a search warrant, by the probation officer or any law enforcement officer" (C.A. App. 39-40).[1]

At various times in 1980, Donald A. Berstler, a National City police officer assigned to the San Diego Integrated Narcotics Task Force, received information that petitioner was distributing heroin in packages of eleven "rolled balloons"[2] to her dealers. Officer Berstler contacted petitioner's probation officer and learned that petitioner was subject to the above search requirement (C.A. App. 40).

On June 18, 1980, officers of the Narcotics Task Force stopped petitioner in her car. One officer identified himself and explained that petitioner was the subject of a narcotics investigation. He also advised petitioner that he knew she was on probation and, as a condition of probation, subject to search. Officer Berstler arrived shortly afterwards and advised petitioner of her *Miranda* rights. Petitioner stated that she understood her rights and was willing to talk to Officer Berstler. He advised her that she was subject to search by a police officer at any time. Petitioner replied that Berstler could search her because she was not holding anything, and that he could search her residence because there

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[1]"C.A. App." refers to the appendix filed in the court of appeals.

[2]"Rolled balloons" are balloons containing narcotics—in this case, heroin.

was nothing there either. A search of petitioner at the police station uncovered no contraband. She was then taken to her residence, where Narcotics Task Force officers and one DEA officer searched the house in her presence. The search uncovered several packages of empty toy ballons, an Ohaus Triple-Beam scale, an aluminum funnel containing a light brown powdery debris, and 52 cellophane packages containing eleven rolled ballons apiece—572 rolled balloons altogether. Laboratory analysis of the contents of the balloons proved positive for heroin. Petitioner was arrested for possession of heroin with intent to distribute it (C.A. App. 40-42).

Officer Berstler searched petitioner's purse following her arrest and located two safe deposit box keys and receipts from two different banks for the boxes. A DEA officer secured a federal search warrant for the boxes. The officer executing the warrant seized approximately $7,000 in cash from one of the boxes (C.A. App. 42).

2. Prior to trial, petitioner moved to suppress the evidence obtained during the search of her house. She argued that: (1) the search pursuant to her probation condition was not in conformance with the holding of *United States* v. *Consuelo-Gonzalez*, 521 F. 2d 259 (9th Cir. 1975) (en banc); (2) she did not consent voluntarily to any search; and (3) none of her statements was voluntary (C.A. App. 4-13). The district court denied the motion to suppress the evidence discovered in petitioner's house, and found that petitioner had consented to the search (Aug. 18, 1980 Tr. 28).

On appeal, petitioner argued that the condition of her probation permitting warrantless searches was not consistent with the Federal Probation Act, 18 U.S.C. 3651, as construed by *United States* v. *Consuelo-Gonzalez, supra*, and that the fruits of the search should therefore have been suppressed. The majority of the court of appeals held that the Federal Probation Act was not relevant to disposition

of the issue (Pet. App. A-4), and that since the probation condition was valid under the California probation statute (Cal. Penal Code § 1203.1 (West Supp. 1981)) as construed by the California Supreme Court (Pet. App. A-4 to A-5), the fruits of the search were admissible (*id.* at A-5). Because petitioner "[did] not challenge the constitutionality of the search under the Fourth Amendment of the United States Constitution," the court did not consider any constitutional issue (*id.* at A-6). Judge Quackenbush, a district court judge sitting by designation, agreed that the Federal Probation Act did not apply, but he dissented from the decision to dispose of the case on that basis. He recognized that petitioner had not raised the Fourth Amendment issue in the district court or the court of appeals, but he would have directed the parties to file supplemental briefs on the constitutional issue and would have invited the State of California to file an amicus brief (*id.* at A-6 to A-13).

ARGUMENT

1. Petitioner renews her claim (Pet. 18-24) that the condition of her probation permitting a warrantless search at any time by any law enforcement officer is not consistent with the Federal Probation Act, 18 U.S.C. 3651, and thus the contraband discovered during the search of her house should be suppressed. The simple answer to this contention is that petitioner is a state probationer; hence, the Federal Probation Act does not apply to her.

Petitioner's probation and its concomitant conditions were imposed by a California state court for a California offense. The Supreme Court of California has upheld, under Cal. Penal Code § 1203.1, the validity of the probation condition that petitioner challenges.[3] *People* v. *Mason*,

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[3]Petitioner's reliance on *United States* v. *Consuelo-Gonzalez*, 521 F. 2d 259 (9th Cir. 1975) (en banc), is inapt. That case involved a *federal* probationer and the Federal Probation Act. That Act by its terms

5 Cal. 3d 759, 488 P. 2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972).

Evidence obtained in a search by state officers is admissible in federal court if the search complied with state standards and the limitations of the Fourth Amendment. See *Preston* v. *United States*, 376 U.S. 364, 366 (1964); *Elkins* v. *United States*, 364 U.S. 206, 223 (1960); *United States* v. *Fisch*, 474 F. 2d 1071, 1075 (9th Cir. 1973). Petitioner's state probation condition has been upheld by the Supreme Court of California. Since petitioner did not raise any objection in either the district court or the court of appeals to the reasonableness of the condition under the Fourth Amendment, the court of appeals properly affirmed the denial of the motion to suppress.

3. Petitioner now also argues that the search violated the Fourth Amendment (Pet. 25-29). The majority below (Pet. App. A-6) and the dissent (Pet. App. A-7), however, are in agreement that the issue was not raised in either the court of appeals or the district court. The court of appeals, therefore, properly declined to address the issue, and its decision does not constitute a precedent on the issue. Moreover, this Court generally will not review issues not raised in the courts below. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339,

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applies only to convictions in federal court. The relevant portion of 18 U.S.C. 3651 states:

> Upon entering a judgment of conviction of any offense not punhable by death or life imprisonment, any court having jurisdiction to try offenses against the United States * * * may suspend the imposition or execution of sentence and place the defendant on probation * * *.

According to 18 U.S.C. 3231 (emphasis added), "[t]he district courts of the United States shall have original jurisdiction, *exclusive of the courts of the States*, of all offenses against the laws of the United States."

362-363 n.16 (1958). No special circumstances argue against application of that rule here.

Federal Rule of Criminal Procedure 12(b)(3) requires that motions to suppress evidence be raised before trial. Otherwise, the suppression claim is waived unless "cause" is shown for the default (Fed. R. Crim. P. 12(f)). No cause excusing petitioner's failure to raise the Fourth Amendment issue has been shown. Petitioner's failure to raise this issue below, moreover, may have caused the government not to introduce evidence such as exigent circumstances or consent that could be extremely probative on the issue of the reasonableness of the search. Accordingly, petitioner should be bound by her failure to raise this claim at the proper time.

In any event, there is no merit to petitioner's claim. She again relies (Pet. 19-23) on the decision in *United States* v. *Consuelo-Gonzalez, supra*. But that case did not forbid all warrantless searches of persons on probation. Instead, the Ninth Circuit held that, even under the Federal Probation Act, a warrantless search would be valid if it were conducted by or under the direction of a probation officer. 521 F. 2d at 266. The search at issue in this case, while not conducted under the supervision of petitioner's probation officer, was conducted after consulting with that officer. And, while the Fourth Circuit's decisions in *United States* v. *Workman*, 585 F. 2d 1205 (1978), and *United States* v. *Bradley*, 571 F. 2d 787 (1978), appear to disallow such searches, even that court would apparently sanction a warrantless search if a statute empowered the searching officer to conduct it. See 585 F. 2d at 1208. The California Penal Code grants just such authority. See *People* v. *Mason, supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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